

SERVED: June 17, 1993

NTSB Order No. EA-3901

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of June, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11272
v.)	
)	
RICHARD M. BOOHER,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, issued on June 4, 1991, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator alleging that respondent violated 14 C.F.R. 91.22(a), 91.31(a), and 91.9.² The law judge, however,

¹The initial decision, an excerpt from the hearing transcript, is attached.

²§ 91.22(a) (now § 91.151(a)) reads:

reduced the proposed sanction from a 150-day suspension of respondent's airline transport pilot certificate to a suspension of 70 days. The law judge further found, regarding sanction, that respondent's filing of an Aviation Safety Reporting Program (ASRP) report should not allow waiver of the suspension as to that portion of the sanction (30 days) applicable to the § 91.22(a) charge. We deny the appeal.³

It is un rebutted in the record that respondent was pilot-in-command of Beechcraft Baron 3902-A on July 10, 1989, during passenger-carrying flights between Asheville, NC and Atlanta, Peachtree DeKalb (PDK) Airport, GA. To support the claimed
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(a) No person may begin a flight in an airplane under VFR [visual flight rules] conditions unless (considering wind and forecast weather conditions) there is enough fuel to fly to the first point of intended landing and, assuming normal cruising speed -

(1) During the day, to fly after that for at least 30 minutes; or

(2) At night, to fly after that for at least 45 minutes.

§ 91.33(a) (now § 91.9(a)) reads:

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry.

§ 91.9 (now § 91.13(a)) reads:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The Administrator withdrew his appeal of the law judge's decision.

allegations, the Administrator alleged in his complaint that, on the return flight to Asheville, respondent operated the aircraft to the point of fuel exhaustion, made a forced landing on a highway approximately 40 miles short of his destination, and took off again after refueling the aircraft with gasoline from a nearby Texaco station rather than the required aviation fuel. On appeal, respondent argues that the Administrator failed to sustain his burden of proving that automotive fuel was added to the aircraft's fuel tanks.⁴ Respondent also argues that his use of his certificate in his livelihood should be taken into account in assessing sanction, and that he should receive immunity from any sanction due to his filing of an ASRP report.

On review of the transcript and exhibits, there is no doubt that there was sufficient evidence to support the law judge's findings that respondent violated the cited regulations. Respondent argues that, without certain proof the Administrator did not submit, he could not sustain his burden of proof. The record, despite the lack of certain evidence that would certainly have been compelling (e.g., information regarding any purchase of fuel at PDK), supports the law judge's findings.

In reaching her conclusions, the law judge was required to assess the credibility of the various witnesses, especially respondent, an air traffic controller with whom respondent

⁴Although respondent's summary of his position indicates his appeal is so limited, the text makes clear that he challenges all the law judge's findings, including the finding regarding fuel exhaustion, and we review all issues.

communicated prior to his highway landing, and the police officer on the scene of that landing. The law judge saw numerous inconsistencies between the testimony of the police officer and that of respondent. Tr. at 218. She specifically found that the testimony of the police officer was more reliable.⁵ Respondent's challenges to the reliability of the officer's testimony, based on various errors in that testimony do not warrant rejecting it as incredible. The discrepancies reflect, instead, a normal range of uncertainty and error in eyewitness accounts, especially by those unfamiliar with aircraft. Respondent offers no other good reason to conclude that the law judge's reliance on this apparently disinterested testimony was arbitrary or capricious. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).⁶

⁵ Respondent testified that he must have gotten water-contaminated gas when he topped off the tanks at PDK and that, after landing on the highway, all he did was drain the main tanks to the point where the water was removed. On the other hand, the police officer testified that there were red gas cans around the aircraft, that he saw someone (not the pilot) pouring from a red can into the aircraft's wing, and that the pilot told him that he had gotten gas from the Texaco station down the road. Tr. at 37-38.

⁶Other inconsistencies in the testimony included: 1) respondent testified that he drained liquid out of four sumps on the aircraft, but the police officer denied seeing any liquid on the ground; 2) respondent testified that the engines never quit, only "detonated," but the air traffic controller who had given respondent a heading to the nearest airport testified that respondent told him that both engines were out; and 3) respondent testified that there were no vehicles on the highway when he landed, but the police officer testified that his call to the

Moreover, respondent's version of events is undermined by his admission that he reported fuel problems neither to management or maintenance when he landed. Respondent also refused to identify from whom at PDK he bought the allegedly bad fuel. Tr. at 169-170 and 65-66.

The law judge declined to waive the 40-day suspension related to the § 91.31(a) charge, finding that waiver was not available because this violation -- using automotive instead of aviation fuel -- was intentional. Respondent claims that immunity should attach to the entire incident if the ASRP program is to be an effective tool. He argues, further, that, because the use of automotive fuel arose from the same incident, it should receive the same treatment as the fuel exhaustion violation. The Administrator, in contrast, believes the law judge's decision is consistent with his program, and supports her separate treatment of the violations.

The law judge found that the use of automotive fuel was deliberate, and we agree that this act must be, in the circumstances before us, a deliberate one. Respondent does not disagree that, from its inception, the ASRP program was not intended to waive sanction in cases where respondents engaged in deliberate acts that violated the regulations. See the Administrator's Reply, at note 6. We, therefore, cannot find

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scene was prompted by a report that, as he was landing, respondent almost hit the top of an oncoming vehicle, and the officer confirmed this report with the driver of the vehicle.

that the law judge's ruling is incorrect.⁷

We must also reject respondent's final argument that the sanction should be reduced because of its impact on his livelihood. See Administrator v. Mohamed, NTSB EA-2834 (1988) at 11, and Administrator v. Williams, NTSB Order EA-3588 (1992) at 7.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The 40-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.⁸

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷Our decision here is limited to the facts before us and should not be construed as a ruling that a portion of the sanction sought by the Administrator should invariably be waived whenever, in a multiple violation case in which an ASRP report has been filed, one or more violations is found to have been unintentional and inadvertent. Such a ruling would require as its predicate substantially more consideration and analysis of the relevant issues than the parties have devoted to the matter in this proceeding.

⁸For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).